IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0233
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
HERSCHEL ROBERTS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20043733

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Phoenix
Attorneys for Appellee

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Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Herschel Roberts was convicted after a jury trial of two counts of unlawful sale of a narcotic drug. He was sentenced on each count to substantially mitigated, 10.5-year terms of imprisonment to be served concurrently. He argues on appeal that the trial court erred by denying his request for additional disclosure and expert assistance to support his defense of racial profiling and selective prosecution. Because the court did not abuse its discretion, we affirm Roberts's convictions and sentences.

¶2 Roberts, an African-American, was arrested after he assisted undercover Tucson Police Officer Geraldo Diaz to buy crack cocaine on two different occasions. In his pretrial disclosure, Roberts listed "[r]acial profiling/selective prosecution" as one of his potential defenses. He later filed a supplemental, pro se document entitled "Notice of Additional Defense," in which he elaborated on his intent to raise the selective-prosecution defense at trial by setting forth the witnesses to be called. He attached to the notice a motion for additional disclosure pursuant to Rule 15.1(b)(8) and (g), Ariz. R. Crim. P. In that motion, he asked the court to order the state to produce fourteen items relating to an undercover sting operation,[1] the purpose of which "was to target and arrest major crack cocaine dealers in specific Tucson areas."

¶3 To assist him in preparing his racial profiling and selective enforcement defense, Roberts requested such items as the photographs and booking forms of all

[1]We note the actual name of the investigation during which Roberts was arrested was "South Park Sweep." Roberts erroneously called the investigation "Operation Weed and Seed." However, his use of the wrong name had no effect on the trial court's ruling. We point it out only to eliminate any potential confusion.

defendants arrested as part of the sting operation and the police department training materials "utilized in teaching officers how to identify 'Major Crack Cocaine' dealers." At the same time, he also sought appointment of an expert witness.

¶4 Roberts submitted three affidavits in support of his motion for disclosure. The first contained his own statements that his attorney was not pursuing his selective-prosecution defense; that he has been addicted to crack cocaine for over fifteen years; and that, during the time of the investigation, "there were as many non[-]African-American crack cocaine addicts in these areas as the[re] were African-American[]" addicts. He stated that Diaz had passed by a group of non-African-American crack cocaine dealers to approach him and had declined when Roberts had offered to introduce him to a Caucasian man who sold crack cocaine. Roberts also stated that none of his approximately thirty non-African-American friends, who are also crack cocaine addicts, "were ever approached by undercover officers asking to purchase cocaine." The other two affidavits contained the sworn statement of another crack cocaine addict who contended his crack-addicted friends "represent as many different races as imaginable" and the statement of a man who dated a crack cocaine addict and claimed he was approached by individuals of all races offering to sell him crack cocaine when he would drive through known crack neighborhoods looking for her.

¶5 After a few status conferences on the matter, the trial court ruled Roberts's counsel could re-interview Officer Diaz on the sole issue of racial profiling. It also ordered the state to provide Roberts with

> 1. The number of persons arrested [in the "South Park Sweep"].
>
> 2. The racial makeup of the persons arrested.
>
> 3. The number of persons charged compared to the number of persons arrested.
>
> 4. The number of persons investigated compared to the number[] of persons arrested.

The trial court set a hearing on whether Roberts was entitled to the appointment of an expert witness to support his racial-profiling defense but denied his motion for additional disclosure. After the hearing on Roberts's application for the appointment of an expert witness, the court ultimately denied that request as well, finding "no supportable evidence to warrant an expert." The state filed a motion to preclude evidence of, or argument about, racial profiling at trial. The trial court granted the state's motion, and the jury found Roberts guilty of both counts. This appeal followed.

¶6 Roberts argues he made the threshold showing of discrimination necessary to be entitled to additional discovery regarding his selective-prosecution defense. We review for an abuse of discretion a trial court's ruling on whether to allow additional discovery. *State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976). Rule 15.1(g) provides a defendant may move the court for additional disclosure if he shows he has "substantial need in the preparation of [his] case for material or information not otherwise covered by Rule 15.1." *See also* Ariz. R. Crim. P. 15.1(b)(8) (providing for automatic disclosure of material that "tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor").

¶7 In *United States v. Armstrong*, 517 U.S. 456, 463, 116 S. Ct. 1480, 1486 (1996), the Supreme Court explained that a claim of racial profiling or selective prosecution "is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." The requirements for a selective-prosecution claim are the same as those in any equal protection case: the claimant must show the prosecutorial policy was carried out with a discriminatory intent and had a discriminatory effect. *Id.* at 465, 116 S. Ct. at 1487. The Court held the required threshold for showing the existence of discriminatory effect is "some evidence that similarly situated defendants of other races could have been prosecuted, but were not." *Id.* at 469, 116 S. Ct. at 1488.

¶8 To support his claim of selective prosecution in *Armstrong*, the defendant presented statistics showing the entire racial makeup of a group of twenty-four defendants who had been prosecuted for possession and distribution of cocaine and crack was African-American. He also presented a newspaper article about inequitable sentencing for crack offenses involving black defendants, and two affidavits based on hearsay and personal conclusions supported by mere anecdotal evidence. *Id.* at 459-61, 116 S. Ct. at 1483-84. The Court held this evidence did not make the threshold showing of discriminatory effect of the government's actions so as to entitle the defendant to additional disclosure. *Id.* at 470, 116 S. Ct. at 1489.

¶9 Roberts contends that, in addition to the statistical evidence showing that thirty-four of the thirty-six people arrested in the undercover operation are black, the

affidavits he submitted provided a "credible showing" that similarly situated persons—namely, Caucasian and Latino drug dealers—had been treated differently by not being arrested. *Id.* at 470, 116 S. Ct. at 1489. But Roberts's affidavits, like the evidence of discriminatory effect found insufficient in *Armstrong*, at most "reported personal conclusions based on anecdotal evidence." *Id.; see also State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974) (trier of fact free to disregard testimony of interested persons); *State v. Clemons*, 110 Ariz. 555, 557, 521 P.2d 987, 989 (1974) (when weighing credibility of accused's testimony, trier of fact can consider that accused "has a vital interest in the outcome of the trial"). Because Roberts's showing is almost identical to the showing ruled insufficient in *Armstrong*, we find no abuse of discretion in the trial court's denial of Roberts's motion for additional disclosure.

¶10 Roberts argues the trial court erred when it failed to appoint an expert on racial profiling and selective prosecution because, he claims, he had met the threshold showing for such an appointment. We review the trial court's ruling on the appointment of an expert witness for an abuse of discretion. *Jones v. Sterling*, 210 Ariz. 308, ¶ 29, 110 P.3d 1271, 1278 (2005). Rule 15.9(a), Ariz. R. Crim. P., provides that an indigent defendant can apply for the county to pay for an expert witness if he can show "such assistance is reasonably necessary to present a defense adequately at trial or sentencing."

¶11 To determine whether a defendant is entitled to have an expert appointed pursuant to the rule, our supreme court has employed the same standard set forth in *Armstrong* for proving entitlement to additional disclosure. *Jones*, 210 Ariz. 308, ¶ 33, 110

P.3d at 1279. In other words, the trial court must "determine whether the defendant has presented credible evidence of both discriminatory effect and intent before appointing an expert." *Id.* And purely statistical evidence will often be insufficient to show that police treated defendants differently than other similarly situated persons of another race. *See id.* ¶ 34. Because we have already determined that Roberts made an insufficient showing of discriminatory intent and effect under the *Armstrong* standard, the trial court did not abuse its discretion in denying his application for a court-appointed expert.

¶12 Affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge